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Supreme Court of the United States

October Term, 1943

No. 301

RADIANT POINT PEN CORPORATION,
Petitioner,

against

C. HOWARD HUNT PEN COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, AND SUPPORTING BRIEF.

ASHER BLUM,
Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved.

Petitioner is charged with infringement of Henwood Patents No. 2,001,726, dated May 21, 1935, and No. 2,121,541, dated June 21, 1938. The District Court herein (R. 247) has not been officially reported. The Appellate Opinion (R. 273) has been reported in 135 F. (2d) 870.

By stipulation, the documentary exhibits have been bound separately from the printed record, in certified and indexed Exhibit Books. The record was thus presented to the Circuit Court of Appeals. Copies of said Henwood patents are found on pages 1 and 2 of said Exhibit Books.

First Henwood Patent No. 2,001,726 (p. 1 of Exhibit Book).

Fig. 1 shows a flat blank, which has flat wings or tabs 10. The first operation is to bend these wings downwardly, thus providing the downwardly-bent and flat wings 10a which are shown in Fig. 2. The flat and downwardly-bent wings 10a form the writing tip (p. 1, 2d col., ll. 10-22).

It is stated that the flat heel 6 of Fig. I is transversely bent or arched as shown at 6a in Fig. 2, and that the flat body 7 of Fig. I is also transversely arched as shown at 7a in Fig. 2. The description does not say a word about transversely arching or bending the flat blank between the wings 10, out of the original flat shape. Each claim requires that the flat area of the blank which is located between the wings 10, should be left in its original flat condition.

After the bending, the nib is slit at 11 (p. 1, 2d col., ll. 30-32), "between the adjacent tabs 10a-10a".

Claim 1 (ll. 4-6), specifies that these wings or tabs 10 are bent,

> "downwardly approximately 90° at opposite sides of a *central area lying substantially in* in the original plane of the blank".

Hence, this claim clearly requires that after the wings have been bent down, these wings should remain flat and that there shall remain an original flat, unbent area of the blank, between the upper or base edges of the downwardly-bent flat wings. The claim requires that the downwardly-bent wings should be flat, and perpendicular to the flat tip of the blank, and that at said flat tip, each edge of the slit 11 should be separated from the respective flat downwardly-bent wing 10a, by a flat part of the original blank.

Claim 2 also repeatedly requires that a part of the blank should be kept in its original flat condition, between the upper edges of the downwardly-bent flat tongues 10a.

This first Henwood patent is to be compared with British Patent No. 2804 of 1886 to Petit (p. 20 of Exhibit Book).

Petit Patent of 1886.

Figs. 1 and 2 show the downwardly-bent tongues *a*, which are identical with the tongues 10a of the first Henwood patent. Figs. 1, 2 and 13 and other figures of the Petit patent show the conventional slit between these tongues *a*. Figs. 12 and 13 of the Petit patent show that the tongues *a*, are in longitudinal angular relation. In Figs. 1 and 2, said tongues *a* are longitudinally parallel.

The Petit patent states the following (p. 1, beginning at line 15):

> "In making a metallic pen according to my invention I form on each side of the point of the pen a small wing or projection of nearly a semi-circular shape.
>
> These wings or projections are bent towards the underside of the pen and are brought parallel or nearly parallel to each other. The point or writing part of the pen thus consists of two small curved parallel plates almost in contact, the curved edges of which when the pen is used come into contact with the paper or surface and effect the writing."

On page 1, lines 39-46, it is stated:

> "The said wings a, a are situated at right angles or nearly so to the nibs of the pen and their edges are of a nearly semi circular figure. The curved edges of the wings a, a when the point is used come in contact with the paper or surface and effect the writing. The curvature of the edges of the wings a, a prevents the points of the pen entering the paper by the pressure exercised in writing and as the wings

> a, a prevent the sharp edge of the *slit* from touching the paper the scratching of the paper and the spluttering of the pen are avoided."

The District Court sustained the first Henwood patent, solely because the Petit patent did not say in so many words, that the slit should be formed after the wings *a* had been bent down. (R. 257, Finding No. 21 and No. 26.)

The practice always has been, since prior to the grant of the Petit patent, to slit the pen point, after completing all bending operations.

Plaintiff got a patent on this idea of first bending and then slitting, in Hawkes U. S. Patent No. 1,365,318, issued to plaintiff on January 11, 1921 (p. 21 of Exhibit Book). Claim 1 of the Hawkes patent reads:

> "The process of making specially pointed pens which comprises shaping the blank and distorting the point in one operation and in a subsequent operation forming the nibs by slitting the pen through the thus distorted point."

The Hawkes patent expired in 1938. The decisions herein extend its monopoly to the expiration date of the first Henwood patent, in 1952.

The practice of slitting a pen-point, *after* it has been finally bent into shape, has been so universal since at least 1880, that such practice has been stated, even in the popular encyclopedias.

"Encyclopedia Britannica" (1911) Vol. 21, page 83.

This describes the completion of all bending operations,

> "and then the central slit is cut by the aid of two very fine-edged cutters".

"The New International Encyclopedia" (1926), Vol. 18, page 276.

> "The last and perhaps the most important mechanical operation is slitting the pen point."

The same disclosure is found in Knight's "American Mechanical Dictionary" (1880), Vol. 2, page 995, and Vol. 3, pages 2367-2368. On page 2368, after describing all the bending operations, it is stated:

"The central slit is then made by a fly-press."

Hence it was unnecessary for the Petit patent to say in 1886 that the slit was formed after the wings *a* had been bent relative to the body of the blank, because this has been the only practice since 1880, six years prior to the grant of Petit's patent.

Petitioner's method of manufacture of its principal type of pen point, which was held to infringe, is shown in Exhibit CC (p. 25 of Exhibit Book).

Starting from the first tapered blank at the left of Exhibit CC, Steps Nos. 1, 2, and 3 show the formation of a central slot of substantial length in the flat blank, thus forming separated flat tongues. This central slot is formed before the wings are bent, and while the blank is flat. When the blank, including said separated flat tongues, is now bent by petitioner's method, no part of the blank remains flat, intermediate the bent tongues. Defendant bends the entire tip of the blank into V-shape, by means of a sharp tool whose knife edge has a width of only 6/1000 inch (R. 115, 221, 223). The width of a human hair is 4/1000 inch (*Gillette Safety Razor Co.* v. *Essex Blade Corp.*, 83 Ed. (2d) on p. 542). Hence petitioner does not bend the wings, at opposite sides of an original flat and unslitted area of the tip of the blank. After the bending operation, no part of petitioner's blank is in the original plane of the flat blank, save the hair-line which corresponds to the edge of the bending blade. The appellate decision herein (R. 276) requires that the knife edge of petitioner's tool should have a width of even less than 5/1000 inch. This is demanding the impos-

sible. Nobody suggested that it was possible to use a bending blade whose edge was thinner than approximately the width of a hair.

Petitioner's pen does not have the flat, parallel downwardly-bent wings of the first Henwood patent.

Before slitting the pen point behind the wings, petitioner die-molds the downwardly-bent wings into closed ball shape (R. 221). This is shown in Step No. 5 of Exhibit CC (p. 25 of Exhibit Book). The result of this die-molding is shown in Exhibit F, on page 13 of the Exhibit Book (R. 125). Then, and as shown in Step No. 6 of Exhibit CC, the point is slitted behind the ball-shaped wings. This slit is along the hair-line at which the blank was bent. The slitting operation removes the metal along this hair-line. Then the entire blank is transversely arched, as shown in the later steps of Exhibit CC, so that no part of the blank remains flat. There is no finding in the appellate decision, that in petitioner's completed point, any part of the tip of the point remains in the original plane of the original flat blank.

Second Henwood Patent No. 2,001,726.

Plaintiff itself used the method of this second patent, by its own testimony, more than two years prior to its filing date of February 4, 1935.

Plaintiff went on the market in 1932 (R. 43). Its manufacture in 1932 is illustrated by Plaintiff's Exhibit 9 (R. 39, 43). From the beginning in 1932, plaintiff's pen points were opened by swaging, as disclosed in the second Henwood patent (R. 39).

The appellate judgment herein was entered on July 23, 1943 (R. 308).

The jurisdiction to grant this writ was based on Title 28, Section 347, U. S. C. A.

Reasons for Allowance of Writ.

The issues upon which this writ is requested, are the validity and infringement of the two Henwood patents.

There is a clear conflict between the decisions herein, and decisions by other Circuit Courts of Appeal, and the decisions of this Court.

The decisions herein give respondents, according to its own claim, a monopoly of the manufacture of cheap pen points for fountain pens. Respondent testified that it sold 14,500,000 of its pen points per annum (R. 45).

The appellate decision (R. 273) does not even mention the sole reason of the District Court for sustaining the first Henwood patent, because it was so clear that in following Petit's patent, the slitting operation must be subsequent to the bending operation.

As enlarged herein, the first Henwood patent prevents the trade from making Petit's device. Nobody testified that it was possible to use a bending tool, whose edge was of less width than about the width of a human hair. As to Claim 2, respondent's only argument is that if the point is first slitted, the subsequent bending of the wings will distort the previously-formed slit. Assume that this is true, and that the trade then straightens the slit by hand or machine. Claim 2, as a claim for an article of manufacture, as enlarged herein, covers Petit's article, made even according to respondent's interpretation thereof, if such article is straightened, after the slit has been formed.

It has been held in the Sixth Circuit that a claim for an article of manufacture, cannot rely on the method of manufacture (*Westinghouse Elec. & Mfg. Co.* v. *Quackenbush*, 53 Fed. (2d) 632, 634).

To sustain the second Henwood patent, after plaintiff used the same more than two years prior to its filing date, is

contrary to the doctrine of *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759.

To sustain the first Henwood patent, after plaintiff had monopolized the same essential idea in its Hawkes patent which expired in 1938 (*supra*, p. 4), is contrary to the doctrine which forbids double patenting, or extension of original monopoly, as stated in numerous decisions of other circuits and of this Court.

Lion Fastener Inc. v. *Hookless Fastener Co.*, 72 Fed. (2d) 985, C. C. A. 3.

Page 988:

"The claims of the second application (and now of the second patent) are distinguishable from those in the first only by greater particularity and corresponding limitations".

"We are constrained to find the inventions of claims 1, 2, 3 and 15 are identical with claims of the first patent. Claims 1, 2, 3 and 15 are therefore invalid for double patenting".

Palmer Pneumatic Tire Co. v. *Lozier*, 90 Fed. 732, C. C. A. 6th.

Page 744:

"One cannot lawfully have two patents for one invention. When once the invention has been used as the consideration of a grant, its value for that purpose is spent, and there is nothing in it on which a second grant can be supported. And this rule holds good though the scope of the two patents may be different. One cannot extract an essential element of his invention from a former patent, without which the former patent would not have been granted, and make it the subject of a subsequent patent. The case of Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, is a signal illustration of the rule which has been settled by that and former decisions of the

> supreme court upon that subject. . . . That decision shows that it is not necessary to the rule that the patents should be for co-extensive inventions, or that the subject-matter thereof should be technically the same. The rule rests upon the broad and obvious ground that, if the second patent is for an invention that was necessary to the use of the invention first patented, it cannot be sustained."

This case has been repeatedly cited and followed, as in,

In re Land, 109 Fed. (2d), 246, 249, C. C. P. A.;
Fox Typewriter Co. v. *Corona Typewriter Co.*, 282 Fed. 502, 508, C. C. A. 6th;
Western Electric Co. v. *Williams-Abbott Electric Co.*, 108 Fed. 952, 955, C. C. A. 6th;
Otis Elevator Co. v. *Portland Co.*, 127 Fed. 557, 562, C. C. A. 1st;
Warren Webster & Co. v. *C. A. Dunham Co.*, 181 Fed. 836, 839, C. C. A. 8th;
Century Electric Co. v. *Westinghouse Electric & Mfg. Co.*, 191 Fed. 350, 352, C. C. A. 8th.

The doctrine of double patenting is applicable to a case in which the two patents are issued to different patentees, because the principle is to forbid extension of an expired patent monopoly.

American Safety Razor Corporation v. *Frings Bros.*, 62 Fed. (2d) 416, 417, C. C. A. 1st.

> "Moreover, courts in dealing with an art, originally pioneer in origin, must carefully scrutinize the constant efforts of those who have enjoyed a profitable patent monopoly to lengthen such monopoly by patents for non-inventive change."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgments of said United States Circuit Court of Appeals and of the District Court be reversed; and that your petitioner shall have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ASHER BLUM,
Counsel for Petitioner.

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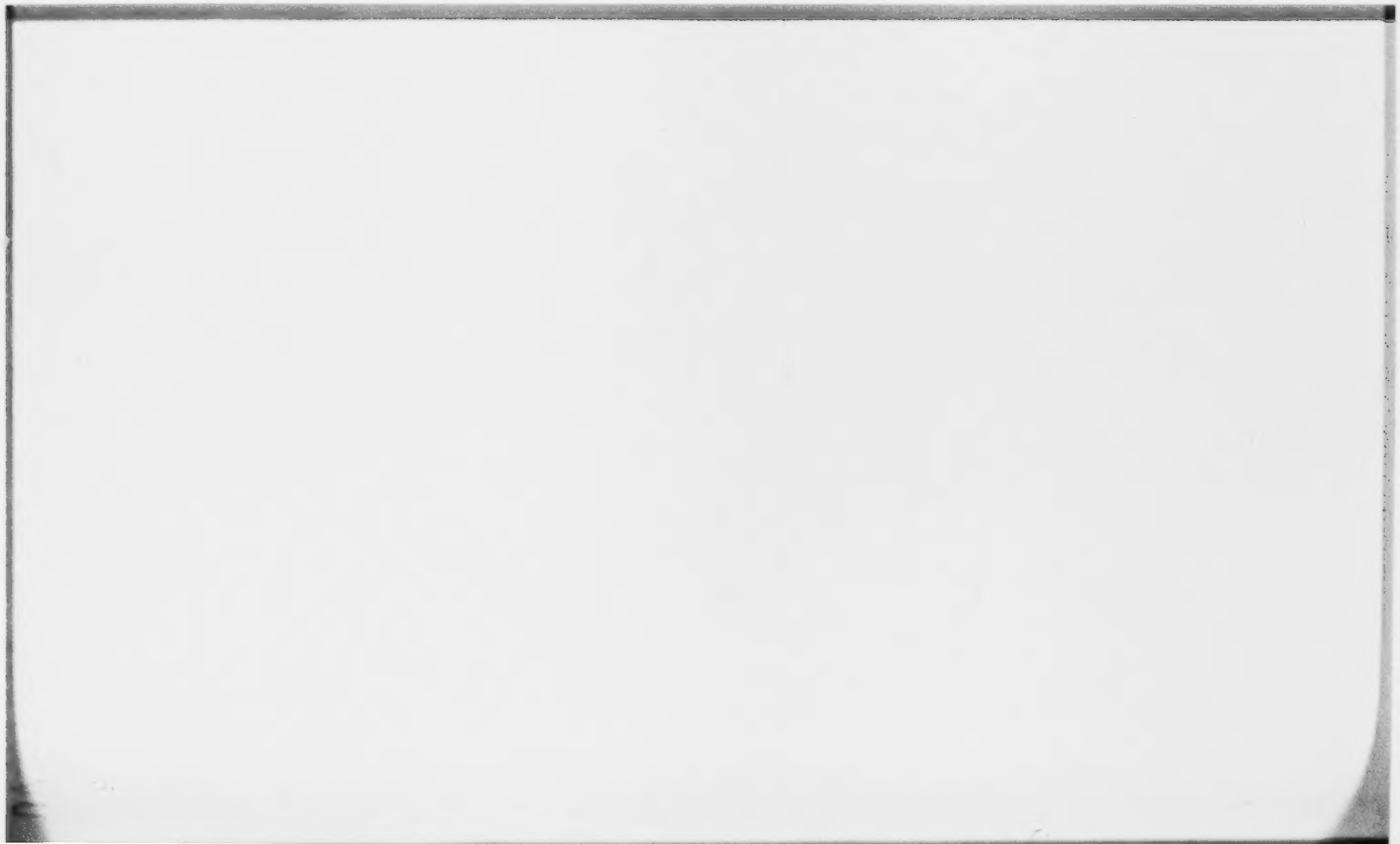
LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300



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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARVEY L. LECHNER,
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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

This is an ordinary patent case.

The patents involved have never been before any Court other than the Courts of the Second Circuit in this case.

Obviously, there is thus no conflict of decisions as between different Circuits as to the validity of the patents or as to infringement thereof.

Nor is there any conflict of decisions internal of the Second Circuit. Both the District Court and the Circuit Court of Appeals concurred in holding the two claims of Patent No. 2,001,726 to be valid and infringed, and claims 1 and 2 of Patent No. 2,121,541 to be valid and claim 1 infringed. (Petitions for Re-hearing were presented to both the District Court and the Court of Appeals, and were denied.)

Examination of the "Reasons for Allowance of the Writ" makes it clear that the sole ground upon which the Petition is founded is the assertion that the decision herein is based on principles in conflict with principles laid down by this and other Courts. This is not so, as will be pointed out hereinafter.

In all other respects, the petition amounts to nothing more than a request for hearing by this Court to review the evidence upon which the Courts of the Second Circuit concurred in reaching their conclusions as to the validity and construction of the patents and infringement thereof by the Petitioner. This is no basis for the granting of a Writ. *General Talking Pictures Corp. vs. Western Electric Co.*, 304 U. S. 177-178.

The case thus plainly falls in the class of *Keller et al. vs. Adams-Campbell Co.*, 264 U. S. 314, and *Layne & Bowler Corporation v. Western Well Works*, 261 U. S. 388, 393, in which latter case the Court stated:

> "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

The present case falls in neither category.

PETITIONER'S REASONS FOR "ALLOWANCE OF WRIT".

On page 7 petitioner asserts that there is a "conflict between the decisions herein, and decisions by other Circuit Courts of Appeal, and the decisions of this Court".

An examination of the text, however, makes it apparent that what is meant is that the Court of Appeals, in sustaining the patents here in suit, sets up principles which run counter to principles laid down in decisions by other Courts of Appeal and this Court.

As to the first Henwood Patent No. 2,001,726, Petitioner argues that claim 2, which is for an *article* of manufacture, for its novelty or patentability "relies on the method of manufacture", i. e., the slitting of the point *after* the tabs or wings are bent down; and that, therefore, the Court in sustaining this article claim runs counter to the principle that a claim for an article of manufacture must recite the features of construction "constituting novelty" over the prior art, and that "the method by which the article is produced is not one of such features", as held in *Westinghouse Electric & Mfg. Co. v. Quackenbush*, 53 F. (2d) 632, 634.

In the first place, to support any such contention of conflict of decision on this score, Petitioner must establish that the Court of Appeals in this case laid down an opposite principle, namely, that it had laid down the principle that an article claim is patentable where the sole novelty resides in the method by which the article is produced.

Nowhere does the Circuit Court of Appeals say that the novelty of claim 2 depends upon the method by which the article is produced, but to the contrary, that Court points out that the novelty resides in features of construction. Thus that Court said (Rec. p. 276), that there is "spacing metal" between the ears at least equal to the width of the forming tool, which spacing metal (the "central part" of the claim) separates the tabs at the "base or

upper sides". As to this, the Court states (same page), "Both the claims in suit are tied to this new feature which was not present in the prior art" (emphasis ours, unless otherwise indicated).

More specifically, the Court of Appeals in distinguishing the patent in suit from the prior patent to Hawkes stated (same page)—

> "Hawkes disclosed nothing about *spacing metal* left in its original plane between any wings or tabs when they were bent down."

and in distinguishing from the prior British patent to Petit, stated (same page):

> "the British patent did not disclose *this* feature and so did not anticipate."

Thus it is clear that the Court of Appeals predicated patentability of claim 2 of the patent flatly upon this new feature of construction, namely, the spacing metal or "central part" between the base or upper sides of the ears and did not predicate patentability of this article claim upon the method by which the article is produced.

In addition, an examination of the claim will show that no such method step of slitting after bending of the ears, is recited therein. There is no reference whatever in the claim to the performing of the slitting operation after bending down of the tabs. To the contrary, the claim positively calls for "a slit", making no mention of when or how it is made. The positively recited features of construction, including the spacing metal between the tips or ears, i. e., the "central part" called for by the claim, constitute the novelty.

Hence the Court of Appeals, neither directly nor indirectly, has laid down a principle conflicting with the principle laid down in the *Westinghouse Electric & Mfg. Co. v. Quackenbush* case (*supra*) upon which Petitioner relies.

Moreover, even if Petitioner's contention as to claim 2 be assumed to be correct, this would put Petitioner in no better case on his Petition; because claim 1 which was held valid and infringed by both lower Courts, is directed to the very method of slitting the pen point *after* the ears have been bent down and there is no contention of conflict of decisions with respect to claim 1 of this Henwood patent.

Under Petitioner's argument, claim 2 in effect becomes claim 1, but since Petitioner has been held to infringe claim 1, what difference does it make whether his contention as to claim 2 is correct or not?

The second ground of conflict of decision advanced by Petitioner with respect to this Henwood Patent No. 2,001,726 is that in sustaining it the Court of Appeals was in conflict with the principle laid down in decisions by other Courts of Appeal which condemn "double patenting".

Respondent owns the earlier issued Hawkes Patent No. 1,365,318, and also this later issued Henwood patent. Petitioner alleges that both patents monopolize the same essential idea and that, therefore, the Henwood patent is a double patenting of what was covered in the Hawkes patent, and an extension of the monopoly thereof.

That very issue was presented before the Court of Appeals, as will be clear on inspection of the opinion (Rec. p. 275), and was decided adversely to Petitioner.

There is plainly, therefore, no conflict with the decisions referred to on the matter of double patenting. The lower Courts held simply that there was no double patenting and there could, therefore, be no conflict with decisions condemning it.

More specifically, and as previously pointed out, page 4 hereof, the Court of Appeals held that both the claims of this Henwood patent "are tied to this new feature", i. e., the spacing metal between the wings or tabs lying in the original plane of the blank, and that "Hawkes

disclosed nothing about spacing metal left in its original plane between any wings or tabs". It is obvious that since the claims of the Henwood patent are directed and limited to a feature not disclosed in the Hawkes patent, there can be no question of double patenting. Thus, neither claim reads upon Hawkes; nor does Hawkes have a disclosure which would have supported the claims. Moreover, as pointed out by the Court of Appeals in its opinion, page 275, and as admitted by Petitioner's own expert witness, Hammer, Rec. p. 230, the Hawkes patent is directed to a different type of pen point, and to a different method of manufacture. As the Court of Appeals stated,

> "The object of this (Hawkes) invention was not to produce a *new* kind of pen point but to save time and material in making the *known* types."

It will be apparent from the foregoing that Petitioner is asking nothing more than that this Court review the evidence to determine first, that claim 2 of the patent depends upon the method for its validity, and, second, that both claims of the patent represent a double patenting of the monopoly supposed to have been granted to Hawkes.

Petitioner presents absolutely no reason why this should be done in this case nor why this is not the "ordinary patent case, with the usual issues" (*Keller et al. v. Adams-Campbell*, 264 U. S. 314, 319) wherein this Court stated that it would "not bring (the case) here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent".

As to the second Henwood Patent No. 2,121,541, Petitioner asserts that what is claimed therein had been publicly used by the plaintiff for more than two years before the application for the patent was filed. Hence Petitioner argues that, in sustaining this patent, the Court has run counter to the decisions of other Courts that a pat-

ent is invalid when its subject matter has been in public use for more than two years.

The same argument was fully presented before the Court of Appeals and was there fully answered by Respondent. The Court of Appeals in sustaining the patent, ruled adversely to the Petitioner.

Thus, again, there is no conflict with decisions of other Courts, and it becomes clear that all that Petitioner is asking is for a review of the evidence upon which the Court of Appeals reached its conclusions.

Lastly, the Petitioner contends that the decisions herein give Respondents a monopoly of the manufacture of cheap pen points for fountain pens, referring to page 45 of the record. The decisions in this case do not go beyond sustaining the patents in suit and do not extend Petitioner's monopoly beyond that lawfully granted in the patents themselves. Moreover, an examination of the testimony referred to shows only that Respondent's sales of the patented pen points averaged fourteen and a half million per year. The record shows that the patented pen point in large part supplanted pen points for cheap fountain pens theretofore used, but this was due to the intrinsic merit of the point and had occurred long prior to any decision in this case. As the Circuit Court of Appeals held (Rec. p. 274):

> "Without an appreciable amount of advertising and apparently because of its own inherent superiority, the pen of the patent has been manufactured and sold in very large quantities."

Conclusion.

The reasons given by Petitioner for granting the writ are insubstantial and it is clear that all Petitioner seeks is another hearing. As was held in *Magnum Import Co. v. De Spoturno Coty*, 262 U. S. 159, 163,

"The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The petition for writ of certiorari should be denied.

Respectfully submitted.

HARVEY LECHNER,
EDWARD H. DAVIS,
GRANVILLE M. BRUMBAUGH,
Counsel for Respondent.